KREDIN SDN BHD

v.

YTF INVESTMENTS SDN BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABDUL MALEK AHMAD JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-216-96]
28 OCTOBER 1997

CIVIL PROCEDURE: *Parties - Locus standi - Right to bring action in the light of assignment by appellant - Whether right to bring action was with assignee*

CIVIL PROCEDURE: *Striking Out - Grounds for - Abuse of the process of court - Rules of the High Court 1980, O. 18 r. 19*

CONTRACT: *Breach - Non-payment of balance of purchase price - Whether contract had been properly terminated*

This was an appeal from the decision of the High Court allowing two applications filed by the respondent ('YTF') – the first, to strike out the appellant's ('Kredin') action under O. 18 r. 19 of the Rules of the High Court 1980 ('RHC 1980') and the second, for the removal of a private caveat lodged by Kredin against three pieces of land belonging to YTF.

According to the facts, YTF and Kredin entered into a sale and purchase agreement ('the agreement') dated 29 October 1992 whereby the latter agreed to purchase three pieces of land for RM47.5 million. Kredin obtained a loan for RM15.7 million from DCB Bank ('the bank'). Security for the loan was in the form of: (a) a piece of land in Klang; (b) an assignment of the rights, title and interest in the land which was the subject-matter of the agreement; and (c) two persons who gave their personal guarantees. A deposit of RM5 million had been paid by Kredin. According to the agreement, the balance of the purchase price of RM42.5 million was to be paid on or before the completion date which was 30 June 1983 and time was of the essence. It was also provided that in the event of Kredin failing to pay the balance of the purchase price by the completion date, the deposit of RM5 million would be forfeited to YTF as agreed liquidated damages and thereupon the agreement would become null and void and YTF would be entitled to deal with the property as it deemed fit. It was also provided that the agreement would be binding on the parties' successors in titles and assigns.

Kredin had in fact failed to pay the balance of the purchase price by the completion date and this was not disputed. YTF therefore terminated the agreement and accordingly forfeited the deposit of RM5 million. There was however at that time no response from Kredin.

Four years later, on 3 February 1988 ('the previous action'), Kredin responded by filing a civil suit against YTF and three others, alleging that YTF had improperly repudiated the agreement and claimed recovery of RM10.3 million plus interest, indemnity for consequential loss and damages. This action had since been struck off for want of prosecution on 17 August 1995.

On 1 March 1995, YTF entered into a sale and purchase agreement with another company to sell the same land. Subsequent to this, Kredin lodged a private caveat and filed the present action.

Kredin's principal prayer was for a declaration that the agreement was still subsisting and for an order that the bank, as assignees, complete the sale and for the property to be transferred to Kredin as a charge by Kredin to the bank. Kredin also prayed that if the bank failed to do so, Kredin wanted to be freed from the assignment and to be given the opportunity to complete the sale.

Counsel for Kredin contended that the issue of whether Kredin as the assignor validly and properly assigned to the assignee bank a right to complete the purchase of the subject property ought to be determined. He also contended that the agreement was not properly terminated as notice of termination was required to be given to the bank and this YTF had failed to do.

Counsel for YTF on the other hand questioned whether Kredin was entitled, in the first place to bring this action in its own name, considering the fact that the assignment by Kredin to the bank was absolute. He argued therefore that only the bank would be entitled to commence any action in relation to the agreement against YTF.

Held:
Per Shaik Daud Ismail JCA

[1] The agreement was properly terminated on 1 July 1983 as Kredin had failed to meet its obligation to settle the balance of the purchase price by the completion date. The agreement therefore became null and void, pursuant to a clause in it.

[2] The action was statute-barred, having been filed 11 years after the purported cause of action arose. Kredin therefore had no cause of action. In any event, if at all there had been a cause of action to institute the action to enforce the agreement against YTF, it would be the bank who would be entitled to do so and not Kredin.

[3] In the previous action, Kredin had claimed damages for wrongful termination of agreement – it was therefore an abuse of the process of the court for it to now seek specific performance – and this was a fit and proper case for the court to exercise its discretion under O. 18 r. 19 of the RHC 1980 as there were no triable issues in Kredin's action.

[4] The right to caveat therefore must fall with the action since Kredin had no caveatable interest over the property.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Ini merupakan rayuan terhadap keputusan Mahkamah Tinggi Kuala Lumpur yang telah membenarkan dua rayuan yang telah difailkan oleh responden (YTF) – yang pertamanya untuk membatalkan tindakan perayu (Kredin) di bawah A. 18 k. 19 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT 1980') dan yang keduanya, untuk pengetepian kaveat persendirian yang dimasukkan oleh perayu terhadap tiga bidang tanah yang dipunyai oleh responden.

Berdasarkan fakta-fakta, YTF dan Kredin telah mengikat suatu perjanjian jual-beli bertarikh 29 Oktober 1982 ('perjanjian tersebut') di mana Kredin telah bersetuju membeli tiga bidang tanah pada harga RM47.5 juta. Kredin telah memperolehi suatu pinjaman dari D&C Bank Bhd ('bank tersebut'). Cagaran untuk pinjaman tersebut adalah dalam bentuk (a) suatu bidang tanah di Klang; (b) suatu penyerahan hak-hakmilik dan kepentingan dalam tanah yang merupakan subjek perkara perjanjian tersebut; dan (c) dua orang yang telah memberikan jaminan persendirian mereka. Suatu deposit telah dibayar oleh Kredin. Menurut perjanjian tersebut, baki harga belian iaitu RM42.5 juta harus dibayar pada ataupun sebelum tarikh penyelesaian iaitu 6 Jun 1983 dan masa merupakan intipati perjanjian tersebut. Juga telah diperuntukkan bahawa jikalau Kredin gagal membayar baki harga belian itu pada tarikh penyelesaian, deposit RM5 juta tersebut akan dirampas oleh YTF sebagai gantirugi yang ditetapkan dan maka dengan itu perjanjian tersebut akan menjadi tak sah dan terbatal dan YTF akan berhak menguruskan harta tersebut seperti yang difikirkan patut. Juga telah diperuntukkan bahawa perjanjian tersebut akan mengikat pengganti hakmilik dan penerima serah hak.

Kredin memangnya telah gagal membayar baki harga belian ketika sampainya tarikh penyelesaian dan ini tidak dipertikaikan. Maka YTF telah menamatkan perjanjian tersebut dan dengan wajarnya telah merampas deposit RM5 juta tersebut. Pada masa itu, tidak ada apa-apa jawapan dari Kredin.

Empat tahun kemudiannya, pada 3 Februari 1988, Kredin telah menjawab dengan memfailkan suatu guaman sivil terhadap YTF dan tiga orang lagi, dengan mengatakan bahawa YTF telah dengan tidak wajarnya membatalkan perjanjian tersebut dan telah menuntut bayaran balik sejumlah RM10.3 juta serta faedah, tanggungan rugi untuk kerugian akibat dan gantirugi. Tindakan ini telah diketepikan pada 17 Ogos 1995 kerana ketiadaan pendakwaan.

Pada 1 Mac 1995, YTF telah mengikat suatu perjanjian jual-beli dengan sebuah syarikat lagi untuk menjual tanah yang sama itu. Kemudiannya, Kredin telah memasukkan suatu kaveat persendirian dan telah memfailkan tindakan sekarang ini.

Permohonan utama Kredin adalah untuk suatu deklarasi bahawa perjanjian tersebut masih wujud dan untuk suatu perintah supaya bank, sebagai penerima serah hak, menyempurnakan jualan tersebut dan supaya harta tersebut dipindahmilik kepada Kredin sebagai cagaran kepada bank. Ianya juga telah memohon bahwa jikalau bank gagal berbuat demikian, maka Kredin dibebaskan dari penyerahan hak tersebut dan diberi peluang untuk menyempurnakan jualan tersebut.

Peguamcara Kredin telah berhujah bahawa isu samada Kredin sebagai pemberi serah hak telah dengan wajar dan sah menyerah hak kepada bank hak untuk menyempurnakan belian subjek harta harus diputuskan. Dia juga telah berhujah bahawa perjanjian itu tidak ditamatkan dengan wajarnya kerana notis penamatan harus diberikan kepada bank danYTF telah gagal berbuat begitu.

Peguamcara untuk YTF pula telah menyoalkan samada Kredin adalah berhak, sama sekali untuk mengambil tindakan tersebut di atas namanya sendiri, memandangkan bahawa penyerahan hak oleh Kredin kepada bank adalah mutlak. Dia berhujah bahawa hanya Bank sahaja yang berhak mengambil tindakan berkenaan dengan perjanjian tersebut terhadap YTF.

Diputuskan:

Oleh Shaik Daud Ismail HMR

[1] Perjanjian tersebut telah ditamatkan dengan wajarnya pada 1 Julai 1983 kerana Kredin telah gagal memenuhi tanggungjawabnya untuk menyelesaikan baki hutang harga belian pada tarikh penyelesaiannya. Maka perjanjian tersebut telah menjadi tak sah dan terbatal, berdasarkan suatu fasal dalam perjanjian tersebut.

[2] Tindakan tersebut telah dihalang-statut oleh keranan ianya telah difailkan 11 tahun setelah kausa tindakan yang dikatakan itu timbul. Maka Kredin tidak mempunyai kausa tindakan. Walau bagaimanapun, jikalaupun terdapat

kausa tindakan untuk memulakan tindakan untuk menguatkuasakan perjanjian tersebut terhadap YTF, hanya bank tersebut yang berhak berbuat demikian, dan bukannya Kredin.

[3] Dalam tindakan sebelum ini, Kredin telah menuntut gantirugi untuk penamatan yang salah – maka sekarang ianya adalah suatu penghinaan mahkamah untuk memohon perlaksanaan tertentu – dan ini merupakan kes yang wajar dan sesuai di mana mahkamah dapat melaksanakan budi bicaranya di bawah A. 18 k. 19 KMT 1980 oleh kerana tidak ada isu yang boleh dibicarakan dalam tindakan Kredin.

[4] Maka hak untuk memasukkan kaveat harus hilang dengan tindakan ini, oleh kerana Kredin tidak mempunyai kepentingan berkaveat atas tanah tersebut.

[Rayuan ditolak.]

Cases referred to:
Hj Hussain Ali v. Dato' Hj Mohd Yaacob [1983] 2 MLJ 227 ***(foll)***
Nouvan Mont Dor (M) Sdn Bhd v. Faber Developments Sdn Bhd [1984] 2 MLJ 268 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19

[Appeal from High Court Malaya, Kuala Lumpur; Suit No: S3-22-178 of 1995]

For the appellant - KS Narayanan (Vasdev Bakshari with him); M/s Jayaraman, Ong & Co
For the respondent - Porres Royan (John Mathew with him); M/s Shook Lin & Bok

JUDGMENT

Shaik Daud Ismail JCA:

This is an appeal from the decision of the Kuala Lumpur High Court, which had on 13 March 1996 allowed two applications filed by the respondent. One was to strike out the appellant's action under O. 18 r. 19 of the Rules of the High Court 1980 and the other for the removal of a private caveat lodged by the appellant against three pieces of lands belonging to the respondent. Both the applications being inter related were heard together, and similarly the appeal.

The essential facts leading to the present appeals before us are that the respondent YTF Investments Sdn. Bhd. (YTF) gave an option dated 29 October 1982 to purchase three pieces of lands to the appellant Kredin Sdn. Bhd.

(Kredin). The purchase price was RM47.5 million. Consideration for the option was a separate sum of RM5.1 million, of which RM300,000 was to be paid in advance and RM4.1 million on execution of the option.

The parties thereafter entered into a sale and purchase agreement for the said lands for the said sum of RM47.5 million. The agreement was dated 29 October 1982.

In the meantime Kredin managed to obtain a loan of RM15.7 million from DCB Bank Bhd. (the bank) to enable it to finance the payment it had to make for the option. Although the option to Kredin was executed by YTF on 29 October 1982 with the acknowledgment that RM300,000 had been paid and received, Kredin in fact paid the RM300,000 to YTF on 9 October 1982.

The bank approved Kredin's loan of RM15.7 million on 28 October 1982 of which RM1 million was for the initial payments for the property and RM5.7 million was for redeeming a piece of land in Klang belonging to UMS Industries Sdn. Bhd. which the bank needed as part security for the loan to Kredin. The other security was an assignment dated 29 October 1982 by Kredin to the bank whereby Kredin agreed "to assign absolutely all its rights, title and interest in and to the said lands and under the sale and purchase agreement and the full benefit granted thereby and all stipulations therein contained and remedies for enforcing the same." As an added security two named persons gave their personal guarantees.

On 29 October 1982 the bank's solicitors forwarded to YTF solicitors the sum of RM10 million which the bank had approved as a loan to Kredin. What was due to YTF then was RM9 million, made up of RM4.8 million for the consideration for the option of RM5.1 million (RM300,000 having already been paid by Kredin) and RM5.0 million as initial payment on deposit towards the purchase price of the property.

On 29 October 1982, YTF signed the option letter to Kredin and acknowledged receipt of RM5.1 million as consideration for the option (ie, RM300,000 plus RM4.8 million). YTF stipulated that no part of the RM5.1 million was refundable in any event.

Kredin exercised the option on the same day by entering into a sale and purchase agreement with YTF. The agreement provides that the purchase price of the property shall be RM47.5 million and that a deposit of RM5.0 million had been paid by Kredin. The agreement provides that the balance of the purchase price of RM42.5 million was to be paid on or before the completion date which by cl. 2 was to be 30 June 1983. Clause 15 provides that time

shall be of the essence. Clause 9 categorically provides that in the event of Kredin failing to pay the balance of the purchase price by the completion date, then the deposit of RM5.0 million shall be forfeited to YTF as agreed liquidated damages and thereupon the sale and purchase agreement shall become null and void and YTF shall be entitled to deal with the property as they deem fit. Clause 16 binds the agreement with the parties' successors in title and assigns.

As mentioned earlier upon signing the loan agreement with the bank on 29 October 1982, Kredin also executed a deed of assignment to the bank which assignment was to secure the term loan of RM15.7 million. YTF was in fact notified of this assignment. Clause 4 of the deed provides that on Kredin paying the balance of the purchase price of the property to YTF and on getting a transfer of the property to Kredin, Kredin at its own expense shall execute a charge of the property to the bank. It seems clear from this that the assignment to the bank was in fact an interim measure to secure the term loan until such time as a legal charge under the National Land Code could be executed to replace it. At this stage it is clear that Kredin is in no position to create a charge over the property until after it became the registered proprietor of the property. It can only become the registered proprietor after paying the balance of the purchase price. It also seems clear that in spite of the deed of assignment, the burden to pay the balance of the purchase price still lies on Kredin. By cl. 1 of the deed of assignment, Kredin in fact assigned to the bank all its rights, title and interest as beneficial owner of the property. By cl. 2, it seems clear that Kredin's obligation to pay the balance of the purchase price was never assigned. There is no evidence whatsoever as to how Kredin intended to pay the balance of the purchase price.

Kredin in fact failed to pay the balance of the purchase price by the completion date and this has not been disputed. Consequently on 1 July 1983, the solicitors for YTF notified the solicitors for Kredin that since the balance of the purchase price was not paid, YTF had terminated the sale and purchase agreement and accordingly forfeited the deposit of RM5.0 million. By this time Kredin was left with a loss of RM11.1 million and on top of which was saddled with a loan of RM15.7 million with the bank. Interestingly enough, and in spite of the predicament that they were then in, there was no response whatsoever from Kredin to the letter of 1 July 1983. In the light of the arguments being now put forward by Kredin on the termination of the agreement by YTF, we would have expected Kredin to immediately respond to the letter of 1 July 1983.

Be that as it may, some four over years later on 3 February 1988 Kredin suddenly responded by filing a civil suit *vide* Civil Suit No. S6-23-62-88 against YTF and three others. In the suit Kredin alleged that YTF had

improperly repudiated the agreement and claimed recovery of RM10.3 million said to have been paid to YTF plus interest, indemnity for consequential losses and damages. This action has since been struck off for want of prosecution on 17 August 1995.

On 1 March 1995, some eleven years after YTF terminated the sale and purchase agreement with Kredin, YTF entered into a sale and purchase agreement with another company to sell the same land for RM82.4 million. Subsequent to this, Kredin lodged the private caveat and filed the present action. The caveat was lodged on 17 May 1995 and the present action was filed on 22 May 1995 (over 2½ months later).

Kredin's principal prayer in the action is for a declaration that the sale and purchase agreement is still subsisting and for an order that the bank, as assignees, complete the sale and have the property transferred to Kredin with a charge by Kredin to the bank. It also prays that if the bank fails to do so, Kredin wants to be freed from the assignment and be given the opportunity to complete the sale. As to when the sale is to be completed is not made clear.

By the previous action it now seems clear that Kredin was no longer pursuing the property as in the earlier action Kredin was merely claiming damages for YTF's alleged repudiation of the agreement.

It is the contention of Mr. Narayanan of counsel for Kredin, that this is not such a straight forward case to have it struck off because, he contends, that there are a number of triable issues and the case ought to be allowed to go to trial. He contends that on the facts of the case, the issue of whether Kredin as the assignor validly and properly assigned to the assignee bank a right to complete the purchase of the subject property ought to be determined. He also contends that the sale and purchase agreement was not properly terminated as in view of the deed of assignment, the notice of termination was required to be given to the bank and this YTF failed to do. It is surprising that such a contention is only put forth over eleven years after the date of completion and after the termination of the agreement. In the light of the provisions of the sale and purchase agreement, we hold that no notice of termination of the sale and purchase agreement need ever be given to anyone. This fact cannot be made more clear than cl. 9 of the sale and purchase agreement. The sale and purchase agreement is automatically terminated by 1 July 1983 when Kredin failed to pay the balance of the purchase price by the completion date ie, 30 June 1983. There is no provision anywhere to say that YTF is required to issue notice of termination and forfeiture. It is our view that YTF was being over cautious when it gave 1 July 1983 notice to Kredin. The central issue is

whether the sale and purchase agreement has in law come to an end, or is it still subsisting. We hold that in law the agreement came to an end on 1 July 1983 when Kredin failed to settle the balance of the purchase price. If there is a cause of action at all it arose on 1 July 1983. We agree with the contention of Mr. Royan of counsel for YTF that since the action was filed more than eleven years after the termination, it is statute barred. Although Kredin's action in essence is seeking declaratory relief, nevertheless such relief can be barred because of undue delay. In *Hj. Hussain Ali v. Dato' Hj. Mohd. Yaacob* [1983] 2 MLJ 227, an action for declaratory reliefs filed over three years after the cause of action arose, the Federal Court held:

> Now the granting of a declaratory judgment is a matter purely at the discretion of the court. We do not think that the circumstances surrounding the present appeals would justify our exercising this discretion in favour of the appellants, where there has been in one view, unreasonable vaccillation and delay.

In the present case too there has been delay of over eleven years and nowhere has the appellant explained their inaction for the delay. Although Kredin is seeking a declaratory relief, it is in essence, seeking specific performance of the agreement. Now in the light of their election in the previous action (ie, Civil Suit No. S6-23-62-88) claiming damages for wrongful termination of the sale and purchase agreement, we hold that it is an abuse of the process of the court for them now to seek specific performance.

On the contention of Mr. Narayanan that since Kredin's obligation to pay the balance of the purchase price was a right and since the assignment was of rights, title and interest and an absolute assignment, the obligation to pay the balance of the purchase price passed to the bank, we find no merit in this contention. We agree with the learned judge's reasoning that the deed of assignment retained the obligation to pay the balance with Kredin, and that the assignment of rights did not carry with it that obligation. Kredin's right to the property was dependent on it discharging its obligation to pay the balance of the purchase price. The right to the property would not materialise unless this burden was discharged. We hold that the rights and the obligation are two distinct features. There is in fact nothing in the deed of assignment to show that Kredin's obligation too was assigned to the bank. Since the deed of assignment was one of the security for the loan, and if it were also to pass on Kredin's obligation, then it would no longer be a security.

Mr. Royan for YTF finally raises another issue which merits consideration. He questions as to whether Kredin is entitled, in the first place, to bring this action in its own name. He queried that since Kredin contends that the assignment was absolute and this is borne out by cl. 1 of the deed of assignment, can Kredin, then, bring this action. Under the assignment, Kredin

has assigned all its rights, title and interest in the lands and the sale and purchase agreement "and all remedies for enforcing the same". Accordingly, he argued that, if there is merit in Kredin's contention (which he denied), only the bank would be entitled to commence any action in relation to the sale and purchase agreement against YTF.

Based on the Federal Court's decision in *Nouvan Mont Dor (M) Sdn. Bhd. v. Faber Developments Sdn. Bhd.* [1984] 2 MLJ 268, it is our view that, if at all, there is a cause of action to institute the action to enforce the sale and purchase agreement against YTF, it would be the bank who would be entitled to do so, and not Kredin. Clause 1 of the deed of assignment makes this clear when together with its rights, title and interest, Kredin also assigned "all remedies for enforcing" to the bank.

After having given careful consideration to all the issues raised by both learned counsel and after perusal of the records of appeal, we are unanimously of the view that the learned judge was justified in exercising his discretion to strike out Kredin's action against YTF. We find firstly, that the sale and purchase agreement was properly terminated on 1 July 1983 as Kredin failed to meet its obligation to settle the balance of the purchase price by the completion date. The said agreement, therefore, became null and void, pursuant to cl. 9 thereof. Secondly, we also find that the action is statute-barred having been filed eleven years after the purported cause of action arose. In the light of this Kredin has, therefore, no cause of action against YTF. We are also unanimously in agreement with the learned judge's finding that, Kredin having waived its right to pursue its interest in the property, its present action is an abuse of the process of the court. We find that this is a fit and proper case to exercise the court's discretion under O. 18 r. 19 of the Rules of the High Court 1980, as there are no triable issues disclosed in Kredin's action.

We, therefore, dismiss the appeal in W-02-216-96 with costs. We order the deposit to go to the respondent to account of costs.

In the light of this decision, and as the lodging of the caveat was grounded on Kredin's action, the right to caveat must fall with the action. Kredin has no caveatable interest over the property. We also dismiss the appeal in W-02-215-96 with costs and similarly order the deposit to go to the respondent to account of costs.

Reported by Mariette Peters-Goh